

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

WHOLE FOODS MARKET CALIFORNIA, INC.¹

Employer

and

Case 20-RC-18069

RETAIL DELIVERY DRIVERS, SALESMEN AND HELPERS,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL 278

Petitioner

DECISION AND DIRECTION OF ELECTION

The Employer, Whole Foods Market California, Inc., is engaged in the operation of a distribution center in San Francisco, California, from which it supplies produce and other grocery items to about 19 of its retail grocery stores in Northern California and four other stores in Washington State and Oregon. The Petitioner seeks to represent approximately 21 drivers in a unit which is essentially identical to the following unit of employees found to be appropriate in the Decision and Direction of Election issued on December 24, 2003, in Case 20-RC-17917²:

¹ I have granted the Employer's unopposed post-hearing motion to correct its name.

² I take administrative notice of, and include in the record as Board Exhibits 3 and 4, respectively, a copy of the Certification of Results of Election and a copy of the Decision and Direction of Election in Whole Foods Markets, Inc., Case 20-RC-17917 (December 24, 2003).

All full-time and regular part-time produce and bake house drivers employed by the Employer at its California Distribution Center located in San Francisco, California; excluding all other employees, shipping and receiving employees, administrative employees, procurement employees, office clerical employees, facility team leaders, associate facility team leaders, procurement team leaders, and shipping team leaders, guards and supervisors as defined in the Act.

The Employer contends, as it did in Case 20-RC-17917, that the petitioned-for unit must include not only the drivers, but the shipping, receiving, quality assurance and order management employees, the dispatcher and the transportation supervisor. The Employer asserts that because it has expanded its workforce and changed its operation, there is a greater community of interest between the drivers and the other distribution center employees and a higher degree of functional integration warranting a finding that the drivers' unit found appropriate in Case 20-RC-17917 is no longer an appropriate unit. The unit that the Employer contends is appropriate consists of approximately 77 employees.³

The Petitioner contends that Transportation Supervisor Ben Chavez should be excluded from the unit as a statutory supervisor or be allowed to vote subject to challenge. The Employer takes the position that Chavez is not a supervisor under the Act and should be included in the unit. The Petitioner further argues that the Dispatcher should be excluded from the unit and the Employer takes the contrary position.

For the reasons discussed below, I find that the unit that was found appropriate in Case 20-RC-17917 remains an appropriate unit except for the following modifications: I will exclude classifications stipulated to be supervisory; I will exclude the dispatcher, whom I find does not share a community of interest sufficient to require her inclusion in the unit; and, I will include the transportation supervisor, whom I find is not a statutory supervisor.

³ There are about 18 more employees in the unit that the Employer contends must be found appropriate than at the time of the prior Decision in Case 20-RC-17917. There are approximately 21 drivers, one dispatcher, one transportation supervisor, 35 shipping employees, eight receiving employees, six quality assurance employees and five order maintenance employees currently employed at the distribution center.

FACTS

Stipulations. The parties stipulated, and I find, that the following classifications should be excluded from the unit as statutory supervisors: shipping team leader, receiving team leader, transportation team leader, quality assurance team leader and accounting team leader.⁴

The Employer's Operation. The record discloses no substantial changes in the Employer's operation, physical plant, administrative structure or managerial hierarchy from that found in the Decision and Direction of Election in Case 20-RC-17917, other than the growth of its workforce as noted above.

Managerial Hierarchy, Supervision and Administrative Divisions. Facility Team Leader Sarah Custer is still the highest ranking manager at the distribution center and is ultimately responsible for decisions involving hiring, terminating and promoting employees. Associate Facility Team Leader Gerald Collins, the facility manager for the distribution center, still reports to Custer.

Administratively, the Employer still organizes its workforce on a team basis with the drivers being on a separate team from the shipping, receiving, quality assurance and accounting/order management employees. Each team continues to be separately supervised by a team leader who reports directly to Associate Facility Team Leader Collins. Teams hold separate monthly team meetings and the members of each team vote as to whether new employees will be included on their respective teams; thus, only the drivers can vote as to whether a new driver will be included on their team.

The transportation team is comprised of about 21 drivers, a transportation supervisor (Ben Chavez), and a dispatcher. It is headed by Transportation Team Leader Larry Keating.

⁴ The team leaders are Larry Keating for transportation; Ken Free for shipping; John Adams for receiving; Charlie Cardinale for quality assurance; and Noel Parkhurst for accounting/order management.

The transportation team is responsible for getting the product delivered to the stores and for bringing products back to the distribution center. The shipping team, comprised of approximately 35 employees, is headed by a shipping team leader, and is responsible for getting outbound products onto trucks so it can be delivered to the stores. The receiving team, comprised of about eight employees, and headed by a receiving team leader, is responsible for getting products into the distribution center's inventory. The quality assurance team, comprised of about six employees and headed by a quality assurance team leader, is responsible for inspecting the product to ensure its quality. Lastly, the accounting team, headed by an accounting team leader, is responsible for financial matters within the distribution center. Under the accounting team is an order management team, comprised of about five employees with no separate team leader, who are responsible for: processing store orders and creating the necessary documentation for the shipping team; reconciling billings from vendors; and generating purchase orders used by the receiving team to pay for vendor products coming into the distribution center.

The Drivers. All of the Employer's drivers are required to have a Class A driver license. No other employees at the distribution center are required to have such licenses. Drivers are required to fill out vehicle inspection reports and trip logs, must undergo periodic drug and alcohol testing, and must have a good driving record. No other employees at the distribution center must meet these requirements. As found in the prior Decision, the primary job of the drivers is still to drive 48-foot tractor trailers and/or bobtail trucks.

All of the drivers still report to work and pick up their trucks at the distribution center before leaving on their routes. By the time most of the drivers arrive at the distribution center, the shipping team employees have usually loaded most of the products onto their trucks and left

for the day.⁵ The drivers typically load the remaining third of the products, which are temperature sensitive, such as bananas, cheese, seafood and flowers. In loading products, the drivers use pallet jacks and forklifts as do the shipping and receiving employees.⁶ Facility Team Leader Custer testified that the drivers normally retrieve the temperature sensitive items or cross-dock items without interacting with the shipping employees. Before leaving to make their deliveries, drivers must conduct a pre-trip inspection of their trucks and fill out a pre-trip inspection report, which takes about 30 minutes. This daily routine is the same as described in the Decision in Case 20-RC-17917. After conducting the pre-trip inspection, the drivers leave the distribution center on their routes and drive to the Employer's retail stores to distribute products. At the stores, drivers interact with store personnel and unload their products, using pallet jacks, and place the products in designated places within the store. According to Custer, drivers now rotate routes and are no longer given permanent route assignments as they were at the time of the previous Decision in Case 20-RC-17917.

While on their routes, drivers may pick up various items to transport back to the distribution center, such as compost, which is waste material used to make fertilizer. Drivers also pick up returns (called credits) from a store, which are items that the store is returning to the distribution center. Drivers also pick up products to be transferred for sale at other Employer stores (called cross-docks). They also pick up shelving, computers and other equipment from the stores. In addition to the foregoing, drivers may also stop at farms or other vendor locations and "back-haul" such products to the distribution center.

⁵ The three bakery routes have a somewhat different routine, requiring drivers to pick up their trucks at the distribution center and drive them to the bake house located about a quarter mile away from the distribution center and then load their trucks with bakery products at that facility before leaving on their routes.

⁶ Drivers and shipping and receiving employees are all certified to use forklifts.

A few of the delivery routes require longer trips to more distant locations, such as Sacramento, Fresno and Monterey, and these routes consume most or all of a driver's shift. Some of the drivers' routes involve making a return trip to the distribution center, unloading and reloading their trucks,⁷ and making additional deliveries. According to Custer, about 80% of the drivers' routes require less than a full shift to complete.⁸ In this regard, the record contains the drivers' schedule for the period January 30 to February 5, 2006, showing that most of the drivers are scheduled for slightly less than a 40-hour work week.

For the drivers whose routes do not consume their entire shift, about 25 to 50% of their work time is spent making deliveries to stores, and the remainder is spent performing back-haul work, as described above, or returning to the distribution center to perform work that needs to be done there. Such work includes driving trucks around in the parking lot to re-position them for loading and unloading; cleaning the trucks, the parking lot and the dock area; dealing with compost; unloading or loading the trucks; and/or assisting in the warehouse with other shipping or receiving type work. Drivers are also sometimes allowed to go home early if there is no work that needs to be done at the distribution center. They are not paid for the remainder of their shift if they leave work prior to the end of their shift.

With regard to drivers performing the task of putting products away at the distribution center, Custer testified that about 80% of the drivers had performed this task and they do it only when there is an enormous quantity of incoming products or when the receiving team is unavailable. At such times, drivers may be overseen by the shipping or receiving team leader while performing such work.

⁷ The drivers reload their trucks at such times because the shipping team is usually gone for the day.

⁸ The shortest delivery route takes about 2 ½ to 3 hours to complete.

Custer also testified that drivers are sometimes held back at the distribution center rather than being sent out on a route in order to move trucks and trailers in the yard when a large quantity of products are being distributed out of the center. Custer testified that about six to eight months ago, the Employer instituted the practice of holding one driver back on each shift to work at the distribution center, whenever the Employer was fully staffed with drivers.⁹ However, she further testified that at the time of the hearing, the Employer was understaffed and needed two to four more drivers. The record does not disclose how long it has been since the Employer was fully staffed with drivers or how frequently it has held drivers back to work at the distribution center.

Schedules. Although the schedules for members of the various teams appear to have changed somewhat since the Decision in Case 20-RC-17917, they reflect that the drivers continue to work different schedules from those of employees on other teams.¹⁰ This is due to the need for drivers' schedules to be compatible with those of the retail stores receiving the products.

⁹ According to Custer, when drivers were held back at such times, they moved trucks in the parking lot, helped to load and unload any trucks that came in or were going out on delivery routes, assisted in receiving products and did compost and clean up work.

¹⁰ Specifically, the record contains a schedule for the drivers for the week of January 30 to February 5, 2006, showing that they are scheduled for delivery routes seven days a week. Most of the drivers work slightly less than 8 hours a day except for two or three drivers who work four ten hour days. The schedule shows that the 13 day drivers start work between 3 and 4 a.m. and end their shifts between 11:30 and 12:00 p.m., except for drivers on the three longer routes to Monterey, Fresno, and Sacramento. The drivers on these routes start work at about the same time as other day drivers, but end their shifts between 2 and 3 p.m., instead of 11:30 a.m. to noon as do the other drivers. Approximately eight night drivers start their shifts at 9:30 or 10 p.m. and end their shifts at 6 or 6:30 a.m. Receiving employees work five days a week, eight hours a day. Two of the receiving employees work from about 12:30 a.m. until 8:30 or 9 a.m. The other six receiving employees begin their shift at about 4 or 5 a.m., and they end their shifts between noon and 1 p.m. The shipping team works four ten-hour days; they begin their shifts at about 2 p.m. and they end their shifts at about 12:30 a.m. Order management employees start work at 4 or 8 a.m. and work until 12:30 or 4:30 p.m. The dispatcher works from 5 a.m. to 1:30 p.m. Most drivers' hours overlap with the shipping team only for about a half an hour prior to the drivers' departure to make their first deliveries.

Permanent and Temporary Interchange and Contact between Drivers and Other Employees. The only evidence of permanent transfers involving driver positions is that in about October 2005, one receiving team member, Terrell Kindred, transferred to work as a driver, and that in 2002, one driver, Tom Reed, transferred to a warehouse position when he had accumulated too many points on his driver's record to continue driving for the Employer. There is no evidence of temporary transfers of drivers to other positions or vice versa, and indeed, none of the other distribution center employees possess the Class A driver license required to drive for the Employer. Nor is there any evidence that shipping, receiving or other non-driver employees at the distribution center have assisted the drivers in making their deliveries.

Custer testified generally that the volume of product shipped in and out of the distribution center and the size of the Employer's workforce have increased in the past two years, but the size of the center has remained the same. According to Custer, this has resulted in drivers doing more loading and receiving type work and interacting with shipping and receiving employees more than they did two years ago. As indicated above, Custer identified various occasions when the drivers engage in work similar to that of the receiving and shipping employees at the distribution center. However, she further testified that about 90% of the time there is no contact between the drivers and the receiving employees and that normally no reason exists for there to be any contact between the drivers and the receiving employees. Custer similarly testified that there is no reason for order management employees and drivers to interact. In this regard, the record shows that the order management employees work at computers in an upstairs office at the distribution center and use a different time clock than do the drivers. Custer also testified that by the time the drivers who work on the day shift (about 14 of the 22 drivers) report to work, the shipping team employees have already left work for the day. She further testified that the

drivers do not normally interact with the receiving employees when unloading back-hauls or with the shipping team when they reload their trucks for a second delivery run. Nor does the record disclose any evidence of regular work interactions between the quality assurance employees and drivers. By contrast, the record shows that the employees on the receiving, quality assurance and order management teams and the dispatcher all have schedules that allow them to interact with each other at the distribution center and that the shipping and order management teams also have schedules that overlap and allow them to interact in handling necessary documentation.

Meetings. The Employer holds meetings for all employees at the distribution center, the most recent of which were two meetings held in 2005. The Employer also holds various work group and team meetings and trainings. Team meetings are attended only by team members and are held on a monthly basis. Certain training, such as that involving forklifts, is given simultaneously to all transportation, receiving and shipping employees.

Wage Rates, Benefits and Other Working Conditions. All of the employees at issue herein are hourly paid and punch a time clock. The hourly rates of pay for the different classifications are as follows: drivers, \$17 to \$21; shipping employees, \$12 to \$18.50; receiving employees, \$14 to \$15; quality assurance employees, \$17 to \$22; and order management employees, \$15 to \$20. Custer testified that the transportation supervisor's wage rate is less than the highest rate of pay for the drivers. The dispatcher's rate of pay was not disclosed. All employees receive the same fringe benefits and all are subject to the same Employer policies, which are contained in an employee handbook. The Employer has no requirement that employees wear uniforms, but for safety reasons does require that all persons working within the distribution center wear steel-toed shoes. The distribution center has two time clocks; one is

located upstairs and is used by the accounting and order management employees and the other is located downstairs and is used by the drivers, the dispatcher, the transportation supervisor, and shipping and receiving and quality assurance employees. The Employer also has a single break room and two sets of lockers for employees.

Transportation Supervisor. Ben Chavez was appointed to the position of transportation supervisor in October 2005. According to Custer, the position was created about two years ago but had remained vacant prior to Chavez being hired into the position. Custer testified that the qualifications for the transportation supervisor job are prior supervisory skills and a Class A driver license.¹¹

Chavez works Tuesday through Saturday nights from about 10 p.m. until 6 a.m. He drives a delivery route three days a week. During the two nights he is working at the distribution center rather than driving a route, his responsibilities include loading and unloading trucks; receiving cross-docks (products being transferred from one store to another); moving trucks as needed in the parking lot; and ensuring that drivers have the tools necessary to make their deliveries.

Transportation team leader Keating arrives at work at about 5 a.m., about an hour before Chavez's shift ends. If drivers have problems while on the road, they generally contact Keating, who contacts Custer or her assistant. On the night shift, drivers also contact Chavez with problems. For example, if a driver has a traffic accident, Chavez will work with the shipping team leader and with Custer to handle the problem. Chavez can change delivery routes with Keating's input. Chavez can also change truck assignments if the need arises. Keating handles driver evaluations and Chavez does not assist Keating in this process. Although Chavez can give

¹¹ The transportation team leader, Larry Keating, who is stipulated to be a statutory supervisor, does not possess a Class A driver license.

input to Keating on such evaluations, the record contains no evidence that he has ever done so.

Scheduling for the drivers and decisions regarding vacation time are handled by Keating and not by Chavez. Custer further testified that Chavez has no responsibilities with regard to hiring and termination decisions and has never hired, fired, suspended or otherwise disciplined, laid off, recalled or promoted any employees.

According to Custer, Chavez possesses the authority to authorize overtime for the drivers. However, she further testified that she has instructed Keating and Chavez that overtime can only be approved if the job must be done right away and cannot wait until the next delivery route or the following day. Custer testified that Chavez has no discretion to deviate from this policy. She further testified that employees can notify Chavez if they are going to be late or absent from work, but he has no authority to order them to come to work, to authorize late arrivals, or to discipline them for being late. Rather, Chavez's only authority with regard to an employee's tardiness or other misconduct is to report it to Keating. Custer further testified that Chavez can allow drivers to leave work before the end of their shift but only if there is no work left to be done at the center. According to Custer, this same policy applies to all employees at the distribution center. Lastly, Custer testified that Chavez cannot authorize drivers to switch their days off.

Chavez's wage rate was not disclosed in the record but Custer testified that it is less than the most senior Class A drivers. He receives the same benefits as other drivers.

The Dispatcher. The dispatcher does not have a Class A driver license. She works from 5 a.m. to 1:30 p.m., in an office located downstairs in the distribution center. She communicates with the drivers by cell phone and notifies them of any changes in their routes. She also processes bills of lading and cross dock load sheets.

ANALYSIS

1. Whether the Drivers Constitute An Appropriate Unit. For the reasons discussed below, I find the drivers still constitute an appropriate unit. It is well established that the Act does not require the unit for bargaining to be the optimum or most appropriate unit, but only an appropriate unit. See *Overnite Transportation Co.*, 322 NLRB 723 (1996). In deciding whether a petitioned-for unit is an appropriate unit, the Board focuses on whether the employees share a community of interest. *Id.* at 724. Factors considered by the Board in determining community of interest among employees include:

[A] difference in method of wages or compensation; different hours of work; different employee benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working time spent away from the employment or plant situs . . . the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and history of bargaining.

Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962). The Board has acknowledged that truck drivers often have a “dual community of interest,” with certain factors supporting their inclusion in the same unit as other plant employees, and certain factors favoring their representation in a separate unit. See *Pacemaker Mobile Homes*, 194 NLRB 742, 743 (1971). In the instant case, I find, as in Case 20-RC-17917, that while there exists a dual community of interest among the drivers and the other warehouse employees, the drivers still share a sufficient community of interest to warrant the conclusion that they constitute a separate appropriate unit.

The record shows that the drivers are the only employees required to possess a Class A driver license, to pass drug and alcohol screenings, and to maintain a safe driving record. *Home Depot USA*, 331 NLRB 1289, 1291 (2000). The drivers are the only employees who drive the Employer’s trucks. They have different schedules from other employees and their work requires them to spend a substantial portion of their work time away from the Employer’s facility. They

have separate immediate supervision from other employees. They earn a higher rate of pay than do the shipping and receiving employees. The record shows only two instances of permanent transfers involving driver positions in the past three years. There is no evidence of temporary interchange and the non-driver employees are unable to perform driving work because they do not possess Class A driver licenses. There is no evidence that other employees assist the drivers on their routes. Custer also testified that there is minimal contact and very little reason for contact between the drivers and most of the distribution center employees with the exception of the dispatcher.

Given such evidence, the fact that the drivers may load and unload products as part of their job or spend a larger portion of their work time at the distribution center than they did at the time of the prior Decision in Case 20-RC-17917, is not sufficient to warrant a finding that they have now lost their separate identity. See *Home Depot USA, supra*.

As in the prior proceeding, the Employer further contends that its facility is highly integrated and that the drivers' work and the work of its other employees at the distribution center is all part of the same functionally integrated process. My reasons for rejecting this argument are the same as those set forth in the Decision in Case 20-RC-17917. Thus, while the work of all employees at the distribution center is focused on receiving and shipping products to the Employer's retail stores, and certain documents are used by drivers and shipping and receiving employees in handling products, the record evidence does not establish the high level of functional integration necessary to overcome all of the factors that support a separate unit of drivers in this case. Thus, the drivers work on a separate team; are separately supervised; do not substitute for shipping or receiving employees or vice versa; have different schedules; different rates of pay; perform different types of work requiring different skills and qualifications; are

away from the Employer's facility a substantial part of the time; and appear to have little opportunity to interact with the shipping and receiving employees due to their being on the road to make deliveries, as well as their different schedules. For these reasons, I find that the drivers are not so integrated with the other distribution center employees unit that they have lost their separate identity, requiring their inclusion in a unit with other employees. See *Publix Super Markets, Inc.*, 343 NLRB No. 109 (December 16, 2004); *Home Depot USA, supra*; *Overnite Transportation Company*, 322 NLRB 723, 724 (1996); *Purnell's Pride, Inc.*, 252 NLRB 110 (1980), reaffirming 234 NLRB 197 (1978); *Pacemaker Mobile Homes, supra*, 194 NLRB at 743.

In reaching this conclusion, I have considered the cases relied on by the Employer and do not find them to be persuasive in the circumstances of this case.¹²

2. Whether the Dispatcher Should Be Included In the Unit. The Petitioner seeks to exclude the dispatcher from the unit and the Employer contends that she must be included in the unit in order for it to be an appropriate unit. The unit placement of the dispatcher is determined based on the same community of interest criteria as applied above.

As shown above, the dispatcher does not have a Class A driver license, does not drive or make deliveries as do the drivers, and spends most of her work time at a desk in the distribution center. She communicates route changes to the drivers but also spends a portion of her time generating documents, such as bills of lading and cross-dock sheets. Given such facts, I do not find that she must be included in the unit in order for it to be deemed an appropriate unit even

¹² I particularly note that *Calco Plating*, 242 NLRB 1364 (1979), cited by the Employer, is distinguishable from the instant case because in *Calco*, the production personnel performed driving work on a regular basis. In addition, both the truck drivers and production and maintenance employees in that case were directly supervised, in part, by the employer's vice president, and they also had comparable wages. Likewise, *Levitz Furniture Co.*, 192 NLRB 61 (1971), cited by the Employer, is distinguishable because the drivers shared common supervision with other employees and other employees performed driving work. These factors are not applicable to the instant case.

though she is on the same team as the drivers and has the same supervisor and she communicates with the drivers on a regular basis. Rather, her job duties show that her community of interest is equally connected with that of other employees working at the distribution center. See *Publix Super Markets, Inc.*, 343 NLRB supra. Accordingly, I am excluding the dispatcher from the unit.

3. Whether Transportation Supervisor Ben Chavez Should Be Excluded From the Unit as a Statutory Supervisor. As indicated above, the Petitioner seeks to exclude Transportation Supervisor Chavez as a supervisor under Section 2(11) of the Act and the Employer takes a contrary position.

The term “supervisor” is defined in Section 2(11) of the Act as:

[A]ny individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In order to support a finding of supervisory status, an employee must possess at least one of the indicia of supervisory authority set out in Section 2(11) of the Act. *Juniper Industries, Inc.*, 311 NLRB 109, 110 (1993); *International Center for Integrative Studies*, 297 NLRB 601 (1990). Further, the authority must be exercised with independent judgment on behalf of the employer and not in a routine, clerical or perfunctory manner. *Clark Machine Corp.*, 308 NLRB 555 (1992); *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986). Further, in determining whether an individual is a supervisor, the Board has a duty to employees not to construe supervisory status too broadly because the employee who is found to be a supervisor is denied the employee rights that are protected under the Act. *Hydro Conduit Corp.*, 254 NLRB 433, 347

(1981). Whether an individual is a supervisor is to be determined in light of the individual's actual authority, responsibility, and relationship to management. See *Phillips v. Kennedy*, 542 F.2d 52, 55 (8th Cir. 1976). Thus, the Act requires "evidence of actual supervisory authority visibly demonstrated by tangible examples to establish the existence of such authority." *Oil Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971). Finally, the burden of proving supervisory status is on the party who asserts that it exists. *Quadrex Environmental Co.*, 308 NLRB 101 (1992); *California Beverage Co.*, 283 NLRB 328 (1987); *Tucson Gas & Electric Company*, 241 NLRB 181 (1979).

In the instant case, the record does not support a finding that Chavez is a supervisor under Section 2(11) of the Act. He spends most of his work time driving a delivery route as do other drivers and when he is at the distribution center, he spends his time loading trucks, moving trucks within the yard and performing other physical labor. The only arguably supervisory authority that he possesses is the authority to grant time off and/or to authorize overtime for drivers. However, Custer's testimony shows that Chavez's authority in this regard is strictly circumscribed by Employer policies that have been communicated by Custer. Thus, there is no evidence that Chavez exercises any discretion or independent judgment in such matters. Moreover, his authority in this regard is not demonstrated by any tangible examples of when he has given such authorization to a driver. Under such circumstances, I find that Custer is not a statutory supervisor.

I further conclude that Chavez possesses a community of interest with the other drivers that warrants his inclusion in the unit since he possesses a Class A driver license, drives a delivery route, has the same supervisor, is on the same team, and receives a comparable wage rate and the same benefits as do other drivers.

Accordingly, I am including the transportation supervisor in the unit.

In conclusion, I find that the unit found appropriate in the Decision in Case 20-RC-17971 remains an appropriate unit for collective bargaining with the following modifications consistent with my findings in the instant case. Specifically, I am modifying the unit certified in Case 20-RC-17971 to include the transportation supervisor and to exclude the dispatcher, the quality assurance employees, accounting employees, order management employees, receiving team leaders, transportation team leaders, quality assurance team leaders and accounting team leaders.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. I grant the Employer's unopposed post-hearing motion to correct its name to read "Whole Foods Market California, Inc." and I take administrative notice that the corrected name is consistent with the California Secretary of State's records.
3. The Employer is corporation with a facility at San Francisco, California engaged in operation of retail grocery stores. During the 12-month period preceding the hearing, the Employer derived gross revenues in excess of \$500,000, and purchased and received goods valued in excess of \$5,000, which originated from points outside the State of California. Based on the parties' stipulation to such facts, I find that the Employer is an employer as defined in Section 2(2) of the Act and is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
4. The Petitioner is labor organization within the meaning of the Act.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act

6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time produce and bake house drivers and the transportation supervisor employed by the Employer at its California Distribution Center located in San Francisco, California; excluding all other employees, dispatchers, shipping and receiving employees, quality assurance employees, accounting employees, order management employees, administrative employees, procurement employees, office clerical employees, facility team leaders, associate facility team leaders, procurement team leaders, shipping team leaders, receiving team leaders, transportation team leaders, quality assurance team leaders, accounting team leaders and guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the **RETAIL DELIVERY DRIVERS, SALESMEN AND HELPERS, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 278**. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their status as such during the eligibility period, and the replacements of

those economic strikers. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, National Labor Relations Board, Region 20, San Francisco, California 94103, on or before **March 2, 2006**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will

the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (415) 356-5156. Since the list will be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

D. Notice of Electronic Filing

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, D.C. If a party wishes to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **March 9, 2006**. The request may not be filed by facsimile.

DATED at San Francisco, California, this 23rd day of February 2006.

/s/ Joseph P. Norelli

Joseph P. Norelli, Regional Director
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Region 20
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